Supreme Court, U.S.
FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1503

In the Supreme Court of the United States

OCTOBER TERM, 1988

NANCY BETH CRUZAN, by her parents and co-guardians, LESTER L. and JOYCE CRUZAN,
Petitioners,
vs.
DIRECTOR OF MISSOURI DEPARTMENT OF HEALTH, and ADMINISTRATOR OF THE MISSOURI REHABILITATION CENTER AT MT. VERNON,
Respondents,
vs.
THAD C. McCANSE, Guardian ad litem,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

PETITIONERS' REPLY BRIEF

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ARGUMENT

The decision of the Missouri Supreme Court in Nancy Cruzan's case warrants review by this Court.

The Attorney General of Missouri essentially admits that the case is "certworthy", but he argues that this Court should nonetheless deny review for two reasons: (1) the case presents an issue that is important only to the petitioners and too narrow to justify the attention of this Court, and (2) *other* state court decisions that are in conflict with *Cruzan* fail the test of *Michigan v. Long*. Op. Cert. at 8. Neither argument supports a decision to deny certiorari.

First, the issue of what federal constitutional rights an incompetent person retains to refuse life-prolonging medical treatment is ripe for resolution by this Court. The federal question has percolated in state courts for more than fifteen years, there is a clear conflict among the states, and confusion reigns. Second, as discussed below, the case presents questions of major national significance. Third, the relevant facts in the case are clear and undisputed. Nancy Cruzan is severely debilitated, in a persistent vegetative state, without hope of ever again interacting with the world around her. Op. Cert. at 2. And, unfortunately, she did not execute a living will or leave behind other clear and convincing directives as to her wishes with respect to life-prolonging medical treatment. But surely such a person does not lose all federal rights to privacy, liberty, due process and equal protection to be free from such treatment. A State simply should not be free to order that such a person must receive all treatment and medical devices possible, regardless of the wishes of the family and doctor. Fourth, federal rights are fully implicated and inextricably intertwined in this case. This Court has clear jurisdiction under the test set out in *Michigan v. Long*, 463 U.S. 1032 (1983). Finally, the decision below is not only unjust, it is wrong. Review by this Court is warranted.

I. Nancy Cruzan's Case Is One of Critical National Importance

The Attorney General of Missouri's principal argument is that this case is not of sufficient importance to justify review by this Court. *See* Op. Cert. at 5-6, 10 n.3, 15-17, 22-23. This argument makes little sense. The public views this case as critically important. Twenty-three different groups, through seven separate amicus briefs, have urged this Court to review and reverse the Missouri decision. The American Medical Association (the "AMA") and Missouri State Medical Association together represent over half of the doctors in the United States and over 80% of the doctors in Missouri, all seeking reversal. As the AMA and other amici point out, more than 10,000 patients are being maintained in the United States today in a persistent vegetative state. *See* American Academy of Neurology Amicus Br. at 3; AMA Amicus Br. at 10, 12 & n.19. For these patients and their doctors this case is vitally important.[1]

In addition to these national and state medical groups, major metropolitan hospitals from Kansas City and St. Louis as well as the major Missouri medical schools have also urged this Court to grant review. These groups all assert that *Cruzan* has created a problem of major national significance. *See* Joint Br. of Coalition of Missouri Hospitals, et al. at 2 (the *Cruzan* decision has left hospitals that "treat tens of thousands of patients" in Missouri each year in a state of "widespread confusion and upheaval"); Amicus Br. of Missouri Baptist Medical Center at 2, 8 ("*Cruzan* seriously undermines an indi-

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1. The *Cruzan* majority in no way limited its decision to PVS patients. All patients who become incompetent to make decisions, regardless of their diagnosis, will lose rights under *Cruzan*. *See* Petition for Certiorari at 8-9.

vidual's right to determine his or her appropriate medical treatment and undermines the maintenance of human dignity" and "creates substantial uncertainty in the medical community. . . ."); Amicus Br. of Washington University, Barnes Hospital, et al. at 4-8. Moreover, newspapers across the state of Missouri[2] and national columnists[3] oppose the type of State dictated medical treatment now sanctioned by the Missouri court. The Missouri Attorney General is cleary wrong. This case is important to hundreds of thousands of doctors, incompetent patients and their families across Missouri and the United States.

The Attorney General also misses the mark by trying to characterize the Missouri decision as being "limited" to the continuation of artificial feeding and thus too narrow for the Court to review. *See* Op. Cert. at 16, 10 & n.3 ("Thus, the only current conflict between the supreme courts of Missouri, Washington, Massachusetts, and Arizona, is that they disagree over the proposed withdrawal or withholding of nutrition and hydration from an incompetent patient. . . ."). This question is not a narrow one at all.[4]

The AMA, the Missouri State Medical Association, the American Association of Neurological Surgeons and the American Academy of Neurology all consider the ques-

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2. St. Louis Post-Dispatch, November 18, 1988; Kansas City Times, December 3, 7, 1988; The Joplin Globe, November 20, 1988.

3. Kansas City Star, April 23, 1989, p. 5K, col. 6, James J. Kilpatrick: "Nancy has no prospect of 'life' that has any meaning. A merciful system of justice will authorize removal, and release her for a better life to come."

4. At one point the Attorney General characterizes the court's decision as being limited to Nancy Cruzan only. Op. Cert. at 5-6. Obviously, if the decision does not apply to others similarly situated to Nancy, then her rights to equal protection are violated.

tion of tube feeding of permanently unconscious or persistent vegetative state patients to be broad and important enough to have adopted official positions on the issue. *See* AMA Amicus Brief at 1a-5a; American Academy of Neurology Amicus Br. at 1a-7a. All of these groups consider gastrostomy feeding to be medical treatment that an incompetent patient, through his family or guardian, has a right to forego if he chooses. *Id.* All abhor the very dilemma created by the *Cruzan* majority decision: forcing a family to choose early on when the prognosis is uncertain whether to insert the tube, knowing that if other treatments fail the doctor will be powerless to remove that tube, and their loved one will be condemned without recourse to a state like Nancy Cruzan's. *Id.; see also* President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, "Deciding to Forego Life-Sustaining Treatment," at 73-77 (U.S. Gov't Printing Office 1987) ("An even more troubling wrong occurs when a treatment that might save life or improve health is not started because the health care personnel are afraid that they will find it very difficult to stop the treatment if, as is fairly likely, it proves to be of little benefit. . . .").

Thousands of incompetent and persistent vegetative state patients across Missouri and the United States, faced with the prospect of unwanted gastrostomy feeding, are now or soon will be trapped in the web of this "narrow" question. In Missouri in particular, the *Cruzan* decision is causing great variation in the treatment of patients whose condition presents exactly this "narrow" question.[5]

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5. Anecdotes abound concerning the confusion caused by the 4-3 decision. One hospital in St. Louis inserted a gastrostomy tube in an elderly incompetent man despite the protests

(Continued on following page)

II. There Is No Adequate and Independent State Law Ground for the Cruzan Majority Decision

The Attorney General also argues that the Arizona and Massachusetts decisions that conflict with *Cruzan* were not based solely on federal grounds and that this petition therefore fails the *Michigan v. Long* test. *See* Op. Cert. at 11-15. This argument not only misconstrues those decisions, but also misunderstands the test established by *Michigan v. Long*.

In *Michigan v. Long*, 463 U.S. 1032 (1983), this Court adopted the "plain statement" rule for determining whether it has jurisdiction to review a state court decision: the Court will assume state courts have acted under federal law unless a plain statement to the contrary is made. 463 U.S. at 1040-41. The state law ground must be spelled out; it must be "clear from the face of the opinion". *Id.* at 1041. A state court decision that does not expressly set out its state grounds or which "appears to rest . . . on grounds *interwoven* with federal law" provides this Court with jurisdiction. O'Connor, "Our Judicial Federalism," 35 Case W. Res. L. Rev. 1, 8 (1984) (emphasis added). The purpose of this rule is to assure uniformity in the recognition of federal rights among the state courts. *Id.* at 6-8.

The *Cruzan* majority did not at any point in its opinion suggest that its decision was based on state law.

Footnote continued—

of his son, claiming *Cruzan* required such action. Other hospitals in Kansas City and St. Louis are apparently ignoring the decision and continue to remove tubes at the request of family members when the prognosis for recovery is hopeless. A hospital in southern Missouri that took such action, however, in compliance with the family's wishes, is now apparently under licensure investigation by the State Department of Health and possibly faces criminal charges.

To the contrary, throughout the opinion the four judge majority treated federal and state rights as one set of individual rights that it balanced against the rights of the State of Missouri. Indeed, the Attorney General admits in his brief that the state and federal rights are interwoven. Op. Cert. at 8 ("The Missouri Supreme Court concluded that *whether arising from common law or constitutional right of privacy*, the right to refuse treatment was not absolute and must be balanced against state interests. . . .") (emphasis added); *see Cruzan v. Harmon*, Pet. App. at A9 ("this case presents a single issue for resolution . . . and this issue is a broad one, invoking consideration of the authority of guardians of incompetent wards, the public policy of Missouri with regard to the termination of life-sustaining treatment and the amorphous mass of constitutional rights generally described as the 'right to liberty', 'the right to privacy', equal protection and due process. . . .").

Repeatedly, the court below bound the federal and state rights together into one federal/state right. *See, e.g.*, Pet. App. at A21-A25 (analyzing the federal right to privacy); Pet. App. at A25 ("neither the right to refuse treatment nor the right to privacy are absolute. . . ."); Pet. App. at A29 ("In casting the balance between the patient's *common law right to refuse treatment/constitutional right to privacy* and the state's interest in life . . . .") (emphasis added); Pet. App. at A31-A34, A38 (same); Pet. App. at A40 (discussing the exercise of common law right to personal autonomy and privacy rights "found lurking in the shadow of the Bill of Rights. . . .").

In failing to set out the separate state grounds and in repeatedly treating Nancy Cruzan's state and federal rights as one right, the *Cruzan* majority provided this

Court with jurisdiction to review its decision. The Attorney General does not address this in opposing the petition. In fact, he appears to emphasize the same "mixing" of rights by the Arizona and Massachusetts courts. *See* Op. Cert. at 12 (in Massachusetts the "right of a patient to refuse medical treatment arises both from the common law and the unwritten and penumbral constitutional right to privacy"). It is clear that the Massachusetts and Arizona cases also would have provided Supreme Court jurisdiction under the *Michigan v. Long* test. *See* Op. Cert. at 11-16 and cases cited therein; *see also* Pet. App. at A10-A19 (discussion by *Cruzan* majority of state cases applying state/federal law to decide the rights of incompetents).

The Attorney General also attempts to escape federal jurisdiction with the unique argument that *Paul v. Davis* wrested from this Court all jurisdiction over liberty rights protected by the Due Process Clause of the Fourteenth Amendment. Op. Cert. at 17-18. That case of course stands for no such proposition. *Paul v. Davis*, 424 U.S. 693, 710 & n.5 (1976) ("There are other interests, of course, protected not by virtue of their recognition by the law of a particular State but because they are guaranteed in one of the provisions of the Bill of Rights which has been 'incorporated' into the Fourteenth Amendment. . . ."). It is exactly such a protected liberty interest that the majority of the Missouri court failed to respect. This Court is constituted to protect such liberty interests against arbitrary government infringement:

> "Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 772 (1986).

CONCLUSION

This Court has jurisdiction over this case. The case raises questions of critical national importance. The decision below is wrong and in conflict with decisions of courts in other states. The facts are not in dispute. Accordingly, the petition should be granted.

Respectfully submitted,

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